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BAILEY, Judge

Case Summary

Appellant-Petitioner Michael A. Allen (“Allen”) appeals the denial of his petition for post-conviction relief challenging his conviction for Voluntary Manslaughter.¹ We affirm.

Issue

Allen raises a single issue for review: whether he was denied the effective assistance of trial counsel.

Facts and Procedural History

On direct appeal, this Court recited the pertinent facts as follows:

Michael Allen (“Allen”) was engaged to be married to Cathy Gullett (“Gullett”). Gullett and Allen frequently fought, especially when they drank alcohol. Allen was possessive of Gullett, and if she was not in Allen’s presence for more than a couple of hours, he would contact or visit Gullett’s family members to ascertain her whereabouts.

Sometime in May 1996, Allen had an argument with Gullett’s daughter. During this argument, Allen kicked in a locked bedroom door causing an eye injury to Gullett’s three-year-old grandson. Gullett’s daughter subsequently filed a petition for a protective order against Allen. A hearing on the petition was scheduled for June 7, 1996.

On June 6, at approximately 2:00 p.m., Allen and Gullett went to the home of Gullett’s sister, Teresa Stewart, in Marion County, where they drank and argued about whether they would appear in court regarding the protective order. Allen pulled a “short nosed 38 special” handgun from his waistband, (R. 845), pointed it at Gullett, and threatened “to take [Gullett] out of her misery.” (R. 799). According to Gullett’s niece, Allen struck Gullett with the butt of the gun. Allen then placed the gun in the front of his pants, and the two left Stewart’s home. Allen and Gullett returned to Stewart’s home at approximately midnight and began arguing about possibly driving to Tennessee to retrieve Gullett’s belongings. Allen finally agreed to take Gullett to Tennessee. At approximately 12:30 a.m., they left together in a GMC sport utility vehicle owned by Bob Hobson, an incompetent and bedridden man for whom Gullett provided home care. Approximately four and a half hours later,

¹ Ind. Code § 35-42-1-3.

Gullett's body was discovered wrapped in a blanket in a Martin County drainage ditch. She had been shot once in the neck.²

Although Stewart saw Allen alone near her home later that morning, Allen did not speak to her or make any inquiry as to Gullett's whereabouts. Allen did not contact Gullett's family regarding Gullett's death or attend her funeral.

On June 11, 1996, the State filed an information charging Allen with murder, and a warrant was issued for his arrest. On June 19, 1996, police located and arrested Allen at a home in Indianapolis. At that time, Allen had a set of keys to Hobson's GMC sport utility vehicle, which police discovered only a couple of houses south of the house where Allen was arrested. The vehicle was found splattered with Gullett's blood. Police discovered an expended bullet from a .38 caliber handgun behind the driver's seat of the vehicle. Allen was subsequently convicted by a jury of voluntary manslaughter, a class A felony.

Allen v. State, No. 51A04-9708-CR-355, slip op. at 2-3 (September 10, 1998).

On April 13, 1999, Allen filed a petition for post-conviction relief, alleging newly discovered evidence, ineffectiveness of trial counsel, and prosecutorial misconduct. On May 17, 2002, the post-conviction court denied the petition without a hearing. Allen appealed, and this Court affirmed the post-conviction court's grant of judgment on the pleadings with regard to the claims of newly discovered evidence and prosecutorial misconduct, but remanded for a hearing on ineffectiveness of trial counsel. Allen v. State, 791 N.E.2d 748, 755-56 (Ind. Ct. App. 2003).

On October 31, 2005, the post-conviction court conducted a hearing. On November 15, 2005, the post-conviction court denied Allen relief, without entering findings of fact and conclusions of law. Allen appealed. On May 3, 2006, the State filed a motion for remand for

² According to the investigating officer's testimony, it takes approximately two and a half hours to travel to Martin County from Indianapolis.

the issuance of findings of fact and conclusions of law. On June 21, 2006, the case was remanded. On August 4, 2006, the post-conviction court entered findings of fact and conclusions of law.

Discussion and Decision

A. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

B. Effectiveness of Trial Counsel

Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland,

466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent inquiries. Strickland, 466 U.S. at 697. Thus, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” Id.

Moreover, under the Strickland test, counsel’s performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

Allen makes numerous allegations of error by trial counsel. Much of his argument distills to the following: trial counsel should have kept out evidence suggesting that Gullett died on June 7, 1996, and should have developed and introduced evidence suggesting that Gullett died on June 6, 1996, a time frame for which Allen purportedly had alibi witnesses. Allen strenuously argues that “scientific” evidence (including evidence of the progression of rigor mortis) would have discredited eyewitness testimony that Gullett was alive and with Allen shortly after 12:00 a.m. on June 7, 1996.

Trial strategy is not subject to attack through an ineffective assistance of counsel claim, unless the strategy is so deficient or unreasonable as to fall outside of the objective standard of reasonableness. Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). Bald assertions of counsel's omissions or mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. See Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001).

Allen claims that trial counsel's decision not to object to an autopsy report introduced by the State in lieu of live testimony could not be explained by reasonable trial strategy. The State counters that trial counsel may have theorized that live testimony by the pathologist would have been more damaging to Allen. Allen did not call trial counsel as a witness at the post-conviction proceedings to inquire as to his strategy or lack thereof. We need not speculate in this regard.³ We merely observe that Allen did not contest Gullett's cause of death; rather, the theory of his defense was that someone else shot her. Moreover, had the autopsy report not been admitted to establish a cause of death, this could not be expected to have changed the trial outcome. The jury had already been informed via testimony, opening statements, and a photographic exhibit that Gullett was found lying in a ditch in Martin County, dead of a gunshot wound.

Allen claims that counsel's introduction of appropriate scientific evidence explaining the progression of rigor mortis would have exonerated him. However, he did not offer such evidence in post-conviction proceedings to establish its evidentiary value. In a related argument, he observes that Gullett's body was found in water and contends that evidence of

recent rainfall in Martin County would have been helpful to explain the progression of rigor mortis. No such evidence was submitted to the post-conviction court. Allen also claims that coroner's notes (allegedly referring to an earlier time of death) would have been valuable exculpatory evidence. Again, Allen did not submit the notes as an evidentiary exhibit at the post-conviction proceedings.

Allen contends that his counsel should have preserved the testimony of Beecher Harold Hall, who allegedly would have offered Allen an alibi, but died before trial. Again, Allen introduced no evidence before the post-conviction court tending to show that counsel knew that Hall's health was fragile such that reasonable representation would involve the preservation of testimony prior to trial.

Allen claims that his counsel should have objected when Indiana State Police Officer Gary Wier related the State's theory that Gullett was killed in Marion County and transported to Martin County. Officer Wier formed this theory because Gullett was last seen in Marion County shortly after 12:00 a.m. on June 7, 1996, and her body was found in Martin County a few hours later. On cross-examination, trial counsel elicited Officer Wier's admission that he was not able to determine from his investigation whether or not the death had occurred in Martin County as opposed to Marion County. The response of trial counsel to the line of questioning falls within the range of reasonable professional judgment.

Allen also complains that his trial counsel should have lodged a chain of custody objection to DNA evidence after a State's witness testified that not he but a co-worker

³ We also decline to speculate, at Allen's suggestion, as to why trial counsel might have introduced a

processed the samples. However, as the post-conviction court observed, the trial court would not likely have excluded the evidence on this basis. This is because the State need not establish a perfect chain of custody, and once the State strongly suggests the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to its admissibility. Troxell v. State, 778 N.E.2d 811, 814 (Ind. 2002).

Finally, Allen argues that his trial counsel should have sought the exclusion of evidence of his prior bad acts, specifically, that he threw a lighter at Gullett and pushed her and that he injured Gullett's grandson. Indiana Evidence Rule 404(b) bars the admission of evidence of crimes, wrongs or other bad acts allegedly committed by the defendant to prove the defendant's character, and forbids the use of this kind of evidence to show that the defendant acted in a manner consistent with that character.⁴

However, the evidence that Allen pushed Gullett and threw a lighter at her was indicative of the nature of the relationship between them. Where a relationship between parties is characterized by frequent conflict, evidence of the defendant's prior assaults and confrontations with the victim may be admissible to show relationship between the parties and motive. See, e.g., Iqbal v. State, 805 N.E.2d 401, 408 (Ind. Ct. App. 2004) (evidence tending to show the hostile relationship was properly admitted). Too, the evidence of prior

coroner's report.

⁴ Rule 404(b) provides in pertinent part as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" Evidence that may otherwise be admissible may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Evid. R. 403.

injury to Gullett's grandson is relevant to show motive because the incident prompted Gullett's daughter to request a restraining order, the hearing was scheduled for the day of Gullett's death, and Allen and Gullett were heard arguing about whether to attend shortly before Gullett died. "Evidence of uncharged misconduct which is probative of the defendant's motive and which is inextricably bound up with the charged crime is properly admissible under [Evidence Rule] 404(b)." Willingham v. State, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003) (internal quotations omitted). The challenged evidence was not introduced merely to show Allen's propensity to engage in crime. We are not persuaded that a contemporaneous objection by trial counsel would have resulted in its exclusion.

Allen has not demonstrated that his trial counsel failed to effectively represent him in the adversarial process. In fact, Allen was convicted not of murder, as the State charged, but was convicted of the lesser offense of voluntary manslaughter. Counsel's efforts and strategies, although they did not ultimately achieve the result of acquittal, were not so unreasonable as to constitute ineffective assistance of counsel. See Badelle v. State, 754 N.E.2d 510, 539 (Ind. Ct. App. 2001) (deciding in relevant part that, when trial counsel's efforts were "more than adequate" to support a defense of mistaken identity, counsel's decision not to call or seek out additional witnesses was a judgment call within the wide range of reasonable assistance), trans. denied.

Allen has failed to demonstrate that trial counsel's performance was deficient and that he suffered resulting prejudice. Accordingly, the post-conviction court did not err in

rejecting Allen's ineffective assistance claim and denying post-conviction relief.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.